BRIEF TO THE STANDING SENATE COMMITTEE ON NATIONAL SECURITY AND DEFENSE

RE: Bill C-51, ANTI-TERRORISM ACT, 2015

April 29, 2015

Assembly of First Nations

Brief to the Standing Senate Committee on National Security and Defense

Bill C-51, *Anti-terrorism Act, 2015*

Introduction

In response to several major events involving terrorism, Canada has taken legislative and other measures to protect citizens and infrastructure from terrorist attacks - from amendments to the Criminal Code and security legislation to various operational security measures. While the threat of terrorism is real, a key issue is: at what cost would the proposed measures in Bill C-51 come to First Nations' rights to assert our collective rights and to exercise the most basic civil and political liberties?

When we examine this issue in a constitutional and human rights context, we see the inextricable and interdependent inter-relationship between individual and collective rights – individual civil and political rights are often relied on by First Nations to advocate and assert collective land rights and jurisdiction (e.g. through freedom of speech, expression, conscience, assembly, freedom from unreasonable search and seizure, privacy rights). Restrictions and violations of individual human rights under Bill C-51 will necessarily impinge the ability of First Nations to engage in free dialogue and take action to assert collective rights.

In a First Nations context, the politics of fear is being played out domestically where First Nations opposition exists, or is simply feared, respecting major development projects such as pipelines or mines. This domestic politics of fear as it applies to the exercise by First Nations of political and civil liberty is fuelled by several factors. One of these is the significant shift in the legal balance of power flowing from a critical mass of First Nations wins in major court decisions defining the Crown's constitutional obligations particularly when making decisions respecting natural resource management and development. There has been notable success in the recognition of Indigenous peoples' collective rights to land and resources in international human rights jurisprudence. Advances have also been made in the promotion and articulation of international human rights norms in their application to First Nations collective rights as peoples and nations.

First Nation governments' positions and decisions respecting any specific development proposal are contingent upon a range of factors including their assessment of the impacts of any given proposal on the land, the waters, the resources and the people, evidence of any respect for the right of First Nations to benefit from resource development in our lands to cumulative impacts and many others. First Nations are not opposed to all major development proposals but First Nations <u>are</u> always opposed to initiatives and behaviour that treat us as if we are not here on the land as peoples with

an equal right to self-determination.

The politics of fear was evident recently in the objectionable remarks recently made by Parliamentary Secretary (Aboriginal Affairs) Mark Strahl in the debate on Mr. Romeo Saganash's private members bill, C-641, *the United Nations Declaration on the Rights of Indigenous Peoples Act*. In his remarks, Mr. Strahl equated support and respect for the principle of free, prior and informed consent as a policy that would cripple the economy. His remarks as a whole[1] on the principle of free, prior and informed consent reveal just how firmly this government views Indigenous peoples and the exercise of our rights under international human rights law as threats to the economic stability of Canada.

Consent is an aspect of aboriginal title as held by the Supreme Court of Canada in the 2014 decision *Tsilhqot'in Nation* v. *British Columbia* (2014 SCC 44). Consent is also an aspect of self-determination in many situations involving land and resource decisions. This is confirmed in the *United Nations Declaration on the Rights of Indigenous Peoples*. Federal opposition to the principle of free, prior and informed consent principles under international human rights law is contrary to Canada's obligations as a member State of the United Nations.

We find highly disturbing the pattern of federal spokespersons and police characterizing any and all opponents, including First Nations, to certain pipeline projects as "extremists" - see RCMP memo entitled "Criminal Threats to the Canadian Petroleum Industry" appended to this submission.

On March 18, 2015, the Aboriginal Peoples Television Network reported that information obtained under Access to Information shows that Aboriginal Affairs not only shared and received information from the Canadian Security Intelligence Agency on the peaceful IdleNoMore movement in 2012 and individuals participating in these activities, it also supplied details about a meeting between government officials and First Nation leaders. This information then was passed on to the Integrated Terrorism Assessment Centre (ITAC)[2].

First Nations people even have been regarded as a threat simply for pursuing human rights claims under the *Canadian Human Rights Act* (CHRA) to ensure equal treatment in the provision of government services to First Nations children and their families. Cindy Blackstock, a highly respected children's rights activist, has been the object of federal government surveillance simply as a result of her advocacy on behalf of First Nations children.[3]

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[1] Available at https://openparliament.ca/debates/2015/3/12/mark-strahl-1/

[2] http://aptn.ca/news/2015/03/18/aboriginal-affairs-shared-wide-range-information-spy-agency-bolster-idle-surveillance-documents/

[3] See http://www.thestar.com/news/canada/2013/05/29/conservative_government_found_spying_on_aboriginal_advocate_tim_harper.html

There also has been surveillance of First Nations and others who attend National Energy Board hearings. The National Energy Board worked with the RCMP and Canadian Security Intelligence Service to monitor the "risk" posed by environmental groups and First Nations in advance of public hearings into Enbridge Inc.'s Northern Gateway project, according to documents released under Access to Information in a 2013 Globe and Mail story.[4] The BC Civil Liberties Association (BCCLA) has filed complaints about this activity with the Commission for Public Complaints Against the RCMP. BCCLA says these activities violate sections 2(b), 2(c), 2(d) and 8 of the *Canadian Charter of Rights and Freedoms*.

Additional evidence of this pattern of pressure to suppress advocacy by First Nations is the imposed conditions of the federal Tribal Council Funding Program that came into effect April 1, 2014.[5] This policy prohibits the use of funding for any Tribal Council costs related to supporting "political advocacy", "political activities" or "any activity that is of a "representative or advocacy nature". Political advocacy in this policy is defined as "participating in activities such as lobbying, petitioning, rallying, etc., which are intended to influence the political decision making process of another government or governments. For further clarity, 'political advocacy' does not refer to the representation by tribal councils and their employees in administrative decision-making processes".

Surveillance and interference with people asserting their fundamental human rights is in itself a human rights violation. Amnesty International Canada in commenting on Cindy Blackstock's situation notes that the United Nations Declaration on Human Rights Defenders[6] recognizes the right and obligation of all members of society to speak out against human rights violations. The Declaration prohibits retaliation, pressure or "any other arbitrary action" against someone as a consequence of their efforts to defend human rights.[7][emphasis added] In addition, rights to privacy, freedom of expression, opinion, association, and peaceful assembly are protected by the *International Covenant on Civil and Political Rights,* notably Articles 17, 18, 19, 21, and 22. First Nations' equal right to self-determination is protected by Article 1 of the same covenant.

Concerns respecting Part 1 - Security of Canada Information Sharing Act

The Assembly of First Nations believes that Part 1 of this Bill will encourage and lead to more unjust surveillance of First Nations people contrary to domestic and international human rights standards.

The new definition of "activity that undermines the security of Canada" contains several broad and vague elements that reach well beyond existing legal definitions of "terrorist activity".

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[4] http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/csis-rcmp-monitored-activists-for-risk-before-enbridge-hearings/article15555935/.

[5] The Tribal Council Funding Program Policy can be found at: https://www.aadnc-aandc.gc.ca/eng/1386290996817/1386291051138

[6] United Nations, General Assembly Resolution A/RES/53/144.

[7] http://www.amnesty.ca/news/news-updates/invasive-surveillance-of-human-rights-defender-cindy-blackstock

The recent amendments to the text of Bill C-51 revised language regarding the scope of information sharing under the proposed *Security of Canada Information Sharing Act* ("*SCIS Act*"). Section 6 of the proposed *Act*, as it was originally tabled in the House of Commons, read as follows:

> *For greater certainty, nothing in this Act prevents a head, or their delegate, who receives information under subsection 5(1) from, in accordance with the law, using that information, or further disclosing it to any person, for any purpose.*

The amended version of Bill C-51 now reads:

> *For greater certainty, the use and further disclosure, other than under this Act, of information that is disclosed under subsection 5(1) is neither authorized nor prohibited by this Act, but must be done in accordance with the law, including any legal requirements, restrictions and prohibitions.*

The revised language, in our respectful view, does not change anything. The provision still enables any receiving agency to further disseminate information to any person, for any purpose, so long as it is "in accordance with the law." We note that existing law governing information sharing is not comprehensive and much of it contains exceptions and limitations. For example, s. 8 of the *Privacy Act* sets out a number of exemptions to the release of personal information without consent. One such exemption allows the release of personal information for "any purpose where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure."

In addition to overriding privacy protections for sharing information, the whole approach to identifying threats to the security of Canada sets up conditions for police and civil servants in many agencies to profile and surveil activists, leaders and ordinary citizens based on their political views and policy objectives, should their actions fall outside what government agencies determine as legal – a highly contentious issue in a First Nations rights context.

The definition in s. 2 of "activity that undermines the security of Canada" includes interference with the "administration of justice" which may in turn include interference with temporary or permanent injunctions. This is a live issue with respect to local First Nations protest activities. Similarly, any number of actions, including political speech, undertaken by First Nations leaders could be construed as interference with the "economic and financial stability of Canada", particularly when government policy defines such stability in terms of the expansion of resource extraction sectors. The core of the government's Economic Action Plan is support for resource extraction.

We note that “interference with critical infrastructure” is similarly included in the definition. While ‘critical infrastructure’ is undefined, this possibly includes mining, hydrocarbon and pipeline projects, at the very least.

The notion of “interference” that is central to paragraphs (a) and (c) of s. 2 for example, is not defined. In the context of blockades by First Nations, these activities can range from the slowing of traffic to distribute information to the full cessation of traffic. The definition excludes and exempts “political dissent” and “lawful protest”. These are also undefined terms. The difficulty with such ambiguity is our experience that corporate actors and governments receive the benefits of generous interpretation, whereas First Nations do not.

The AFN believes the broadly worded definition in s. 2 of “activity that undermines the security of Canada” and the high likelihood of differences of opinion about what is “lawful” dissent or protest exposes First Nations to unjust risk of surveillance and profiling.

The Act would amend s.4 of Fisheries Act to permit information sharing to other government of Canada agencies to detect, identify, analyze, prevent, investigate or disrupt maritime activities which may undermine the security of Canada. Given the number of conflicts regarding fisheries (including the controversy regarding the herring fishery right now), this section could be used by DFO and CSIS to conduct disruption operations against First Nations protesters, fishers and governments.

Our reading of the Bill is that First Nations and individual First Nation persons may never know what information is being shared, nor will they be able to challenge such sharing.

Canada must abide by international human rights law and must correct its current practice of over-surveillance and other efforts to suppress the fundamental civil and political rights of First Nations people exercising their inherent rights to speak about, and take peaceful political action on, human rights issues, both individual and collective.

Concerns respecting Parts 3 and 4

The Assembly of First Nations shares the concerns of many other commentators about:

1. the legal uncertainty of the meaning of the proposed new offence - advocating and promoting “terrorism offences in general” (proposed Criminal Code s. 83.221 in Part 3 of Bill C-51);
2. the overly broad definition of “terrorist propaganda” in s. 83.222(8) in Part 3;
3. the proposed preventative detention provisions which would allow warrants approving Charter violations in advance (proposed Criminal Code s. 83.3, in Part 3);
4. the new powers contemplated for CSIS under this Bill to disrupt activities that are protected by the Charter (Part 4).

These all raise very serious Charter issues and questions about Canada's commitment to international human rights standards. Many of our core concerns relate to the sweeping definition of activities captured within the scope of the bill, combined with the vague and remarkably limited safeguards proposed. Despite the assurances of government, these safeguards would likely not apply to a range of First Nations issues.

The vagueness in what constitutes a terrorism offence may have profound and unintended consequences, which extend far beyond the First Nations context. For example, whether Bill C-51 would apply to state sponsors of terrorism in terms of violations of the Terrorist Bombing Convention may have profound implications for Canadian foreign policy. Broad definitions of terrorism will create a wide range of unintended consequences, for First Nations and for Canada.

Based on the overwhelming evidence that First Nations are already the object of specious surveillance in violation of our fundamental human rights and privacy rights, we have real fears about where legalizing and encouraging such behavior under Part 1 of this Act will lead - particularly with respect to the above mentioned provisions that create new criminal offences and provide new powers of detention, and CSIS powers to "disrupt", all under a cloak of secrecy.

With respect to the new powers contemplated for CSIS, the recent amendment to Bill C-51 relates to the proposed "threat disruption" powers for CSIS, and states that Bill C-51 is not giving any "law enforcement" powers to CSIS. However, the range of activities authorized by this "threat disruption" power includes activities we traditionally think of as belonging to the police, such as detaining and holding individuals, interrogation, and restricting movement.

We do not see this amendment as bringing significant change to allay concerns about potential for CSIS to violate fundamental human rights.

Limiting Liability

The AFN has grave concerns with respect to the proposed section 9 of the Security of Canada Information Sharing Act. Essentially, the provision will operate as a bar against civil liability in the administration of the Act. Section 9 creates a qualified immunity against civil suits arising from "good faith" information sharing. Civil liability for government misconduct serves as an important form of accountability. Civil liability not only provides an important form of redress to individuals, but serves as a powerful reminder to government of its duties and obligations. Immunizing "good faith" information sharing instills a reverse onus whereby the burden is on the victim to demonstrate that government agents acted in bad faith. In the First Nation context where financial resources to mount civil actions are scarce, the proposed limitation on liability is likely to go unchecked.

First Nations activism, relationship building & the rule of law

The recent amendments to Bill C-51 explicitly exclude all “advocacy, protest, dissent and artistic expression” from the definition of “activity that undermines the security of Canada.” While this amendment is welcome, the Assembly of First Nations remains concerned that the broad definition of security will continue to capture expressive activities. First Nations people are often forced to take a stand against actions or initiatives by governments that refuse to respect or protect our rights. The 1990 Oka conflict is one such example. These activities are often deemed “protests” when in fact First Nations are only calling on Canada to obey its own laws, which include the recognition and affirmation of inherent Aboriginal rights and Treaties under the Constitution.

At the core of this discussion for First Nations is the unfinished business of balancing federal and provincial laws and authorities with the inherent jurisdiction and sovereignty of First Nations. This discussion is about reconciliation - reconciling Canada’s claims to sovereignty with First Nations’ pre-existing rights, title and jurisdiction, and Canada’s Treaty obligations. Issues need to be addressed, not as a matter of public safety, but at the constitutional level and through fundamental changes to the federal comprehensive claims policy, the federal self-government policy and resource regulatory regimes.

Freedom of speech, expression, conscience and assembly are essential elements of First Nations cultures and societies. These freedoms are integral to asserting inherent rights in the face of colonialism and asserted Crown sovereignty. The protections afforded to First Nations activists, cited by proponents of Bill C-51, are inadequate. This statement is not based on speculation, but rather on experience.

Since the adoption of section 35 of the *Constitution Act, 1982*, federal and provincial governments often have adopted excessively narrow interpretations of court decisions recognizing and upholding First Nations’ rights.

In the face of Crown failure to apply general principles of law even from Supreme Court of Canada decisions to new and similar fact situations through appropriate policies, decisions and processes, First Nations are often left few options other than asserting rights through “protests”, blockades and “occupations” - to communicate positions and as a means of physically and symbolically asserting inherent jurisdiction.

Most of the foundational principles of aboriginal rights law have their origins in prosecution of Indigenous rights activists for allegedly illegal conduct. Under C-51, it is increasingly likely that cases such as *Sparrow*, *Van der Peet* and *Badger* could be classified as ‘terrorist’ activity. Even the recent *Tsilhqot’in* case had its origins in a protest by the Tsilhqot’in Nation over forestry issues.

Permitting CSIS or other law enforcement agencies to engage in kinetic or other disruption operations against Indigenous rights activists might seriously jeopardize the ability of First Nations to seek vindication of aboriginal rights claims in civil courts.

These concerns have been expressed above with respect to surveillance of Indigenous human rights defenders.

However, First Nations have also faced kinetic disruption, involving foreign security forces, working collaboratively with domestic security agencies. The only reason the AFN is aware of such incidents is that they were reported in foreign news sources.[8]

The Security Intelligence Review Committee (SIRC) has never issued any thematic reports specific to the activities of Canadian intelligence agencies and First Nations activists. As a result, any information which we do possess on such operations (be they pure analysis of information, information gathering or disruptive operations) is thus quite limited.

While the AFN lacks reliable information on CSIS activities, this case serves as an example of our concern that Canadian security agencies will expand kinetic operations against First Nations human rights defenders and protesters in order to advance interests unrelated to terrorism, such as interests related to civil, tax or human rights litigation.

Bill C-51 would both expand the potential for disruptive operations, by extending considerable protections to CSIS agents in any number of activities, including, possibly, immunity from prosecution while conducting disruptive operations. This raises the specter of increased use of 'agent provocateurs' in the context of protests without accountability or review.

When private sector interests are granted rights under federal or provincial law in ways that infringe First Nations collective rights, disputes can arise. Private sector entities sometimes seek injunctions against First Nations people taking political action to assert inherent and Treaty rights.[9] This can lead to First Nations individuals becoming criminalized when they refuse to cease such actions or when they are deemed

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[8] Carolyn Thompson, "Canadian Man Admits Assaulting US Government Agent" (Pioneer Press: 05/04/2009), online: http://www.twincities.com/localnews/ci_12292650. See also, James M Odato, "Illicit Tobacco Fight's Weak Link" (Albany Times Union: 11/10/2013) online: http://www.timesunion.com/local/article/Illicit-tobacco-fight-s-weak-link-4971160.php.

[9] See for example, *Hudson Bay Mining & Smelting Co.* v. *Dumas et al.,* 2014 MBCA 6. This case is also an example of how peaceful blockades can be considered "unlawful" depending on how a statute is drafted and interpreted. See also, *Behn* v*. Moulton Contracting Ltd.*, [2013] 2 SCR 227, 2013 SCC 26 (CanLII), http://canlii.ca/t/fxc12. The *Behn* case increases the difficulty for First Nations to challenge corporate injunctions on the basis that corporate conduct undermines the ability of First Nations to exercise aboriginal or treaty rights. This is a particularly disturbing outcome, given decisions such as *SWN Resources Canada Inc* v *Claire*, 2013 NBQB 328 (CanLII), http://canlii.ca/t/g0trb. In that case, a corporate actor was able to secure an ex-parte injunction – the First Nations protesters did not have an opportunity to appear to argue the injunction. These cases, combined with Bill C-51, may not only elevate civil complaints to criminal matters, but may also raise them to national security issues – while at the same time depriving First Nations with the opportunity to advocate in support of their rights and interests.

unlawful.[10] This in turn would raise a risk of such behavior leading to surveillance under the authority of Part I of Bills C-51 because First Nations rights assertions often relate to developments that involve for example, infrastructure projects or challenge conventional notions of how sovereignty is exercised in Canada.

The rule of law is the legal principle that law should govern a nation, as opposed to arbitrary decisions by individual government officials. Determining what the rule of law is, in the often complex process of determining First Nations rights, requires a "comprehensive and nuanced" approach because of the complex mix of private interests, statute law, and aboriginal and Treaty rights.[11]

Adopting laws and operational practices that expose First Nations activists, leaders and citizens to more criminal profiling through Bill C-51's vague and broad concepts of threat undermines efforts at reconciliation. Canada's security legislation should be better informed and guided by the minimum standards of domestic and international human law and First Nations' section 35 rights.

The reconciliation that the Supreme Court says is the objective of section 35 of the *Constitution Act, 1982* would be placed in jeopardy under this Bill by creating conditions where First Nations activists are unjustly and wrongly profiled as potential threats to the "security of Canada".

In addition, the impacts of this Bill on First Nations capacity to assert and exercise our collective rights through the exercise of fundamental civil and political rights should be discussed with First Nations as part of the Crown obligations under section 35 of the *Constitution Act, 1982*.

As a result, the AFN opposes Bill C-51 and recommends:

1) That the Government withdraw the Bill and consult properly with First Nations about its impacts on our rights.

2) That the Government discuss with First Nations options for a review process to examine all federal legislation that can impact the assertion of our section 35 rights.

[10] For example, see *Platinex Inc.* v. *Kitchenuhmaykoosib Inninuwug First Nation*, 2008 CanLII 11049 (ON SC).
[11] *Frontenac Ventures Corporation* v. *Ardoch Algonquin First Nation*, 2008 ONCA 534; *Henco Industries Ltd.* v. *Haudenosaunee Six Nations Confederacy Council* 2006 CanLii 29082 (ONCA).

ABOUT THE ASSEMBLY OF FIRST NATIONS

The Assembly of First Nations (AFN) is the national, political representative of First Nations governments and their citizens in Canada, including those living on reserve and in urban and rural areas. Every Chief in Canada is entitled to be a member of the Assembly. The National Chief is elected by the Chiefs in Canada, who in turn are elected by their citizens.

The role and function of the AFN is to serve as a national delegated forum for determining and harmonizing effective collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action and for advancing the aspirations of First Nations.

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